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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANNE CLEELAND, Plaintiff and Appellant, v. DONALD PETERSON, Defendant and Respondent.	G051542 (Super. Ct. No. 30-2014-00737857) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Frederick Paul Horn, Judge. Reversed and remanded with directions.

Anne Cleeland, in pro. per.; and J. Russell Tyler, Jr., for Plaintiff and Appellant.

Safarian & Baroian, and Harry A. Safarian, for Defendant and Respondent.

* * *

Anne Cleeland appeals from an order granting defendant Donald Peterson's special motion to strike her cause of action for wrongful eviction on the ground it constituted a strategic lawsuit against public participation (a "SLAPP action") pursuant to Code of Civil Procedure section 425.16. She argues the court erred in granting the motion because her cause of action did not arise from Peterson's protected activity of serving notice of termination or filing an unlawful detainer action. Instead, she claims the gravamen of her cause of action was Peterson's retaliation for her exercise of lawful tenant rights, in violation of Civil Code section 1942.5 (section 1942.5).

Cleeland also argues that even if her cause of action arose from Peterson's protected activity, the court erred by concluding she had not shown a probability of prevailing on the merits of her cause of action. And finally, she contends the court erred in awarding Peterson $20,000 in attorney fees as prevailing party on the anti-SLAPP motion because the amount of attorney fees claimed by Peterson was unsupported by substantial evidence.

We agree with Cleeland that her wrongful eviction cause of action did not arise from Peterson's protected activity. Accordingly, we reverse the order granting Peterson's special motion to strike and direct the trial court to vacate the order awarding Peterson his attorney fees.

FACTS

Cleeland filed her initial complaint against Peterson, her landlord, in August 2014. She also named as defendants the property management company retained by Peterson, along with several individuals employed by that company (collectively, agent). Cleeland alleged causes of action for breach of the warranty of habitability, violation of Civil Code section 1940.2, subdivision (a), trespass, fraud and intentional infliction of emotional distress. According to the complaint, Cleeland entered into a

written agreement with Peterson in February 2012 to lease a residence on Balboa Island. The lease specified Cleeland's property was not insured by Peterson and included an advisement that she carry her own insurance to protect her property.

According to the complaint, Cleeland's initial lease term expired in February 2013, and Peterson's agent allegedly offered Cleeland the opportunity to enter into a new term lease. Cleeland declined, and continued to reside in the leased premises on a month-to-month basis. Thereafter, Peterson's agent again recommended Cleeland purchase renter's insurance to cover her belongings, but she declined. The agent later informed Cleeland that Peterson "'would very much like for you to obtain renter's insurance,' and that if such insurance were purchased, [he] would be willing to forego any hike in the rent for a year, and would draw up a new lease."

Cleeland again refused to obtain renter's insurance, and explained to the agent that under California law, the expired lease terms still applied to her month-to-month tenancy, and that lease did not require her to have renter's insurance.

On April 16, 2014, Peterson's agent allegedly sent Cleeland an e-mail stating that Peterson was willing to offer her a new lease with the rent increased by $100 per month, and including a requirement that she obtain renter's insurance. Cleeland was given until Friday, April 18, to decide whether to accept that offer. The e-mail stated that if Cleeland did not agree to those terms, she should consider the e-mail to be a 60-day notice of termination of the lease, with the exact date of termination to be decided on April 18.

In response to that e-mail, Cleeland allegedly wrote to Peterson directly, to ensure he was aware of his agent's communications with her. She also pointed out some serious problems with the condition of the premises, including apparent black mold in the kitchen. Cleeland received no direct response from Peterson, instead hearing back from the agent, who warned her not to "harass" her elderly landlord.

On April 18, Peterson's agent informed Cleeland that the 60-day notice of termination of the lease was effective as of April 16, the date of the e-mail. Cleeland accused the agents of harassing her and breaching the covenant of quiet enjoyment. In response to her complaint, the agent allegedly became belligerent, and then gave her notice that a prospective tenant would be shown the property on April 21.

The property showing on April 21 was allegedly a sham, with the prospective tenant revealed to be a former employee of the agent. Nonetheless, the agent allegedly used the showing as an opportunity to invade Cleeland's privacy and look through her personal items.

Thereafter, the agent allegedly attempted to schedule a "final walk-through" of the property on June 4, but Cleeland refused. The agent also allegedly insisted that Cleeland "turn in her keys" on June 15. Again, Cleeland refused, apparently on the ground that the agent had not served the termination notice in proper fashion.

The complaint alleges Cleeland again attempted to communicate with Peterson directly, informing him that if matters were not resolved, he would be held liable for the agent's actions. She also offered to pay Peterson six months' rent in advance, including a $100 per month increase, if he would split the cost of new carpeting with her and fire his agent. Again, Peterson did not respond, but the agent did — again attempting to dissuade Cleeland from communicating with Peterson directly and telling her that continued efforts to do that would constitute "elder abuse."

Thereafter, the agent allegedly gave Cleeland formal notices of scheduled contractor inspections, which were carried out in a disruptive and upsetting manner. One of the inspections was scheduled for Saturday, June 28, at 2:00 p.m., despite Cleeland's objection this was not "normal business hours." Cleeland was unable to be present for the inspection and it was conducted over her objection.

On November 5, 2014, Cleeland filed her first amended complaint, adding a cause of action for wrongful eviction in violation of section 1942.5. That new cause of

action incorporated by reference all the facts Cleeland had alleged in her original complaint, plus the facts that the mold remediation and other repairs of the residence had begun in July 2014, rendering the kitchen and other portions of the premises uninhabitable for sustained periods of time. As a consequence, Cleeland tendered rent payments which were reduced in a proportionate amount. The agent rejected some of those payments based on a disagreement about the appropriate reduction. Additionally, it alleged that in October 2014, Peterson filed a complaint for unlawful detainer against her, based on a 60-day notice to quit allegedly served on June 17, 2014. After that complaint was served, Cleeland vacated the premises.

Cleeland's wrongful eviction cause of action was based on section 1942.5, which governs cases where the landlord retaliates against the tenant for the tenant's exercise of lawful rights. Section 1942.5 states, in pertinent part, that "[i]f the lessor retaliates against the lessee because of the exercise by the lessee of his rights under this chapter . . . , and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days of any of the following: [¶] (1) After the date upon which the lessee, in good faith, has given notice pursuant to [Civil Code] Section 1942 [pertaining to notice of "dilapidations rendering the premises untenantable which the landlord ought to repair"], or has made an oral complaint to the lessor regarding tenantability."

Cleeland alleged Peterson had violated section 1942.5 by threatening to evict her and filing the unlawful detainer action within 180 days of her report of the black mold and other habitability issues, and doing so in retaliation for her lawful refusal to obtain renter's insurance and her habitability complaint. She alleged that her damage from the retaliatory conduct included her costs of moving to another property after she vacated the premises.

Peterson responded to Cleeland's first amended complaint with a special motion to strike the wrongful eviction cause of action as a SLAPP action under Code of Civil Procedure section 425.16. He argued that the wrongful eviction cause of action arose from his protected petitioning activity of serving a 60-day notice to quit and filing an unlawful detainer action. He also argued Cleeland had no probability of prevailing on the merits of her claim because: (1) she admitted Peterson had done nothing wrong; (2) Peterson was entitled to serve a notice terminating a month-to-month tenancy; (3) the notices of termination could not have been retaliatory because Cleeland's habitability complaint came after the first notice; and (4) all eviction activity was protected by the litigation privilege.

The only evidence offered in support of Peterson's motion was the declaration of Donna Peterson, who identified herself as Peterson's daughter. She stated in the declaration that her father was elderly, that he had asked her to take over managing the property in March 2012, and that she had done so while keeping him apprised of her decisions. However, Peterson had become "emotionally overwhelmed" in November 2013, and had asked her to "handle all affairs concerning the Property without burdening him with any information or decisions concerning its management." Donna explained that since early 2012, the property had been managed by the agent, which she described as "an independent management company." She claimed that she had communicated with the agent "regarding their efforts in getting [Cleeland] to obtain renter's insurance." Donna stated that "[a]fter [Cleeland] was first given a notice terminating her tenancy, [Cleeland] commissioned a home inspection and complained of a mold problem in her unit. This was the first notification of its type from [Cleeland]. By this time, the decision had already been made to serve her with a notice terminating her tenancy and, if she refused, following through with unlawful detainer proceedings." Donna denied that any of the notices were served for any reason other than Cleeland's refusal to obtain renter's

insurance, and she acknowledged that Cleeland "vacated the Property before adjudicatiaon of the unlawful detainer action."

Cleeland opposed the special motion to strike, arguing that the gravamen of her wrongful eviction cause of action was not the act of filing the unlawful detainer action, but was instead the underlying decision to terminate her tenancy for a retaliatory reason, citing *Ulkarim v. Westfield LLC* (2014) 227 Cal.App.4th 1266 (*Ulkarim*). Cleeland also objected to most of Donna's declaration, pointing out that the statements therein lacked foundation and were based on hearsay.

The court overruled all of Cleeland's objections and granted the motion.

In February 2015, Peterson filed a motion for nearly $28,000 in attorney fees (representing 56.3 hours at $495 per hour) as prevailing party on the anti-SLAPP motion. The court granted the motion, but reduced the fees awarded to $20,040.

DISCUSSION

The Anti-SLAPP Law

The anti-SLAPP law, Code of Civil Procedure section 425.16, provides a summary mechanism to test the merit of any claim arising out of a defendant's protected communicative activities. The law authorizes courts to strike any cause of action which falls within the statute's purview, if the plaintiff cannot demonstrate a probability of prevailing on it.

The court engages in a two-step process in determining whether a defendant's motion to strike should be granted. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection

with a public issue,' as defined in the statute." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

The statute defines "'act[s] in furtherance of a person's right of petition or free speech'" as including: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e).) The statute is required to be broadly construed (*id*., subd. (a)), and protects even private conversations about a public issue. (*Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1174-1175.)

Then, only if the court finds the defendant has made the required showing, the burden shifts to the plaintiff to demonstrate "there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1); *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567-568.) "'To establish such a probability, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 274.)

We review an order made pursuant to the anti-SLAPP law on a de novo basis. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999 ["Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently on appeal"].) "While we are required to construe the statute

broadly, we must also adhere to its express words and remain mindful of its purpose." (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 864.)

"In deciding whether the initial 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability . . . is based.'" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

Protected Activity

Cleeland's primary argument on appeal is that the court erred in concluding her wrongful eviction cause of action arose from protected activity. Relying on *Ulkarim, supra*, 227 Cal.App.4th 1266, she contends the gravamen of her cause of action is the wrongful decision to evict her for retaliatory reasons, rather than Peterson's communicative acts of giving notice of termination and filing the unlawful detainer action. We agree.

In *Ulkarim*, the plaintiff, a commercial tenant, filed suit against her landlord alleging various causes of action. In particular, the plaintiff alleged that the landlord had breached their lease agreement "by 'giving unilateral notice of termination without cause and in bad faith for the purpose of transferring Plaintiff's successful business to [a third party and also] breached ¶20 of the [Agreement], providing [plaintiff] is a month-to-month tenant upon holdover after 7/3/2012." (*Ulkarim, supra*, 227 Cal.App.4th at pp. 1271-1272.) The landlord filed an action for unlawful detainer, the court entered judgment in its favor and the landlord thereafter recovered possession of the premises. (*Id*. at p. 1271.) The landlord then moved to strike several of the plaintiff's causes of action under the anti-SLAPP law, claiming they arose from its protected activity of giving notice of termination. (*Id*. at p. 1272.) Although the trial court agreed, and struck the causes of action (*ibid*.), the Court of Appeal reversed (*id*. at p. 1283).

The appellate court first acknowledged that "[f]iling an unlawful detainer complaint is protected activity under the anti-SLAPP statute, as is service of a notice of termination preceding an unlawful detainer complaint. [Citations.] A cause of action arising from such filing or service is a cause of action arising from protected activity." (*Ulkarim, supra*, 227 Cal.App.4th at p. 1275.) It then noted, however, that "'the mere fact an action was filed after protected activity took place does not mean it arose from that activity.' [Citation.] 'Moreover, that a cause of action arguably may have been "triggered" by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity.'" (*Ibid*.)

The court then explained that "Courts distinguish a cause of action based on the service of a notice in connection with the termination of a tenancy or filing of an unlawful detainer complaint from a cause of action based on the decision to terminate or other conduct in connection with the termination." (*Ulkarim, supra*, 227 Cal.App.4th at p. 1276.) In *Copenbarger v. Morris Cerullo World Evangelism* (2013) 215 Cal.App.4th 1237, a case cited in *Ulkarim*, this court stated, "Although an unlawful detainer action itself is protected activity under section 425.16, terminating a lease is not. [Citations.] A complaint arising out of or based on the dispute or conduct underlying the unlawful detainer action is not subject to a special motion to strike." (*Copenbarger*, at p. 1245.)

Here, Cleeland's wrongful eviction cause of action did not arise from the notice terminating the lease or the filing of the unlawful detainer action because as Cleeland herself alleged in her complaint, her tenancy was month-to-month, and thus there was nothing inherently wrong with Peterson doing either of those things. What Peterson could not do, however, was *retaliate against Cleeland* in the manner prohibited by section 1942.5 — i.e., he could not, within 180 days of her complaining about tenantability, recover possession of the premises or "cause [Cleeland] to quit involuntarily" in retaliation for Cleeland having exercised her rights. (§ 1942.5, subd.

(a).) It is that retaliation, rather than the lease termination itself, which makes Peterson's conduct actionable. Consequently, it is Peterson's alleged retaliatory decision to terminate Cleeland's tenancy, rather than the filing of the unlawful detainer action, that is the gravamen of her cause of action.

Peterson relies on *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169 (*Wallace*), which concludes that in a cause of action for wrongful eviction, "[t]he three-day notice and unlawful detainer are two of the acts on which liability is premised, and those acts are certainly not collateral to a cause of action that seeks relief for causing a lessee to quit involuntarily or bringing an action to recover possession." (*Id.* at p. 1187.) However, the tenants in *Wallace* stated separate causes of action for "wrongful eviction" and "retaliatory eviction" (*id*. at p. 1178), and although the court struck both causes of action under the anti-SLAPP law (*id*. at p. 1216), its analysis of the latter focused specifically on the significance of the landlord's *retaliatory motive* in taking the actions it did. According to *Wallace*, that motive was irrelevant because "causes of action do not arise from motives; they arise from acts." (*Id*. at p. 1186.) We respectfully disagree. While it may be true that most causes of action depend solely on the defendant's actions — or failure to act — to establish liability, certain causes of action do turn on the defendant's alleged wrongful *motive* for acting. For example, the tort of wrongful termination is entirely dependent on motive, since employment relationships are presumptively at will, and thus in the absence of an employment contract for a specified term the employer's *act* of terminating the employment relationship does not give rise to a cause of action. It is only when the termination is carried out for a reason prohibited by law that liability attaches.

Hence, in *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, the court reversed an order striking an employee's cause of action styled "defamation" under the anti-SLAPP law because, while the defendant's alleged *act* was obviously communicative, "'it is immediately apparent to anyone who reads the

Complaint [that this case] is clearly all about race discrimination, harassment and retaliation. . . .'" (*Id*. at p. 624.) Similarly, in *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273 (*DFEH*), the court concluded that it was the landlord's discrimination, rather than its acts, that gave rise to the cause of action: "[T]he pleadings and the affidavits submitted by the parties establish the gravamen of DFEH's action against Alta Loma was one for disability discrimination, and was not an attack on any act Alta Loma committed during the rental property removal process or during the eviction process itself." (*Id*. at p. 1284.)

The same is true here. Cleeland's complaint alleged her tenancy was month-to-month, and thus acknowledged Peterson had the right to terminate it without cause. Her cause of action for wrongful eviction was based specifically on section 1942.5, which prohibits *retaliation* by a landlord in response to a tenant's habitability complaint or exercise of other lawful rights. Consequently, her cause of action arose from the alleged retaliation, rather than any specific act taken by Peterson to terminate the tenancy. And because retaliation is not protected under the anti-SLAPP law, the trial court erred by granting Peterson's motion to strike the cause of action.

Other Issues

Having concluded that Cleeland's wrongful eviction cause of action did not arise from activity protected by the anti-SLAPP law, we need not reach her further contention that she showed a probability of prevailing on the merits of that claim. And because the mandatory award of attorney fees made to Peterson as prevailing defendant on the anti-SLAPP motion (see Code Civ. Proc., § 425.16, subd. (c)(1)) is fatally undermined by our reversal of the order granting the motion, we need not address Cleeland's attack on the amount of fees awarded to him. On remand, the trial court is directed to vacate the order awarding attorney fees.

DISPOSITION

The order is reversed and the case is remanded to the trial court with directions to vacate the order awarding attorney fees to Peterson as the prevailing defendant on the anti-SLAPP motion. Cleeland is entitled to her costs on appeal.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.